Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor

COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO W-01–2A OF 2006

MOKHTAR SIDIN, MOHD. GHAZALI AND LOW HOP BING JJCA

5 DECEMBER 2007

Civil Procedure — Judge — Judicial immunity — Whether judge had judicial immunity while exercising duties when overseas and on leave — Courts of Judicature Act 1964 s 14(1)

Civil Procedure — Judge — Suit against judge — Action against judge in judicial capacity — Representation by Attorney General — Whether Attorney General under a mandatory duty to provide legal representation to judge

On 25 October 2002, the plaintiffs, also the plaintiffs in another action ie Kuala Lumpur High Court Civil Suit No D2–22–987 of 2000, had obtained default judgment for some RM14m ('the judgment sum') against Public Bank Bhd ('Public Bank') in that action. The plaintiffs sought to enforce the default judgment by way of a writ of seizure and sale on 15 November 2002. As a result, Public Bank issued a banker's cheque ('the cheque') for the judgment sum in the name of the senior assistant registrar ('the SAR'). The plaintiffs' claimed that when the plaintiffs required Public Bank to pay the cheque to the plaintiffs directly, Public Bank had directly contacted the first defendant, a judge of the Kuala Lumpur High Court, who was at the material time on leave in Singapore. He gave instructions by way of a telephone call and directed the SAR to allow and accept Public Bank's payment into court instead. Subsequently, payment of the cheque was stopped. When the plaintiffs did not receive the judgment sum, they blamed the defendants, particularly the first defendant claiming that the first defendant's acts and omissions had caused the plaintiffs' loss and damage, thereby seeking the judgment sum, in addition to aggravated, punitive and exemplary damages of RM10m, together with interest and costs. The plaintiffs then applied to prevent the Attorney General or his officers from acting for the first defendant, which was dismissed with costs. The defendants' application to the court to strike out the plaintiffs' statement of claim under O 18 r 19(1)(a), (b) or (d) was allowed. The plaintiffs appealed.

Held, dismissing the appeals:

(1) At the material time the first defendant was a judge of the Kuala Lumpur High Court as well as the head of civil division having charge of all matters pertaining to the execution of assets in Kuala Lumpur, including writs of seizure and sale. In the title to the action, and para 2(a) and (b) of the plaintiffs' statement of claim, the plaintiffs had sued the first defendant as a judge of the High Court. The plaintiffs were bound by their own pleadings. There was no question of the first defendant having been sued in his personal or private capacity (see para 18);*Decision Regarding Counsel for Christopher Fernando's Objection to the Attorney General's Application to Represent Dato' Augustine Paul* [2002] 2 AMR 2357 followed.

(2) The Attorney General was under a mandatory duty to provide the first defendant with legal representation in order to defend and protect the office and institution of the administration of justice in Malaysia (see para 21); *Tun Dato' Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Haji Omar & Ors* [1988] 3 MLJ 149 and *Malaysian Bar v Tan Sri Dato Abdul Hamid* [1989] 2 MLJ 281 followed. In the absence of particulars to substantiate them, there were no legal or factual impediment to the Attorney General and his officer providing legal representation to the first defendant. The court below had correctly held that the Attorney General and his legal officers were legally bound to represent the first defendant (see paras 28–29).

(3) Upon a true construction of O 46 r 13(2), r 17, r 21 of the Rules of the High Court 1980 ('the RHC') it was abundantly clear that all monies received pursuant thereto had to be paid into court first and the money so credited shall be paid to the plaintiffs as judgment creditors pursuant to these rules. The court was unable to uphold the plaintiffs' submission that the cheque should be paid direct to the plaintiffs, as that would run counter to the rules. In the circumstances, the cheque was rightly made out in favour of the SAR and accepted by the sheriff. When Public Bank paid the judgment sum by way of the cheque in satisfaction of the default judgment, the default judgment ceased to have any force or effect (see paras 47–48).

(4) Since the default judgment in the instant appeal ought no longer to be of any force or effect, the substratum of the plaintiffs' action collapsed, and the plaintiffs no longer had any reasonable cause of action against the defendants (see para 50).

(5) Judicial immunity conferred by s 14(1) of the Courts of Judicature Act 1964 is wide enough to extend to the discharge of the first defendant's duties under art 121 and the written law. These duties include all acts and duties expected or assigned to be performed by the first defendant,

both within and outside Malaysia. The instructions and orders made by the first defendant were entirely within his authority and within the limits of his jurisdiction legally conferred upon him by art 121 and the written law, regardless of the fact that he was on leave in Singapore and outside the country. The mode and the manner including the place from which he exercised that authority (phone call from Singapore while on leave) were irrelevant. The facts and circumstances available in the court below and now in the instant appeal undoubtedly attract the application of judicial immunity under s 14(1). The plaintiffs' purported cause of action was really an exercise in futility under O 18 r 19(1)(a), there being no reasonable cause of action against the first defendant, and so no vicarious liability could be attributed to the second defendant (see paras 68–69).

(6) The plaintiffs' action against the defendants was filed on the basis of the writ of seizure and sale against Public Bank purportedly in execution of the default judgment. The action was filed on 14 May 2005, which was some two years after the default judgment had been set aside. The inclusion of these material and undisputed facts in the plaintiffs' statement of claim would have put the entire picture in proper perspective. That in turn would have plainly and obviously demonstrated that the plaintiffs' purported cause of action arising from the writ of seizure and sale against Public Bank was without any foundation whatsoever. To say the least, it was scandalous, frivolous or vexatious under O 18 r 19(1)(b), in the sense of being wholly unnecessary and irrelevant; or that it was obviously unsustainable (see paras 77–78).

[Bahasa Malaysia summary

Pada 25 Oktober 2002, plaintif-plaintif, yang juga plaintif-plaintif dalam tindakan lain iaitu Guaman Sivil Kuala Lumpur No D2–22–987 tahun 2000, telah memperoleh penghakiman ingkar sejumlah RM14j ('jumlah penghakiman') terhadap Public Bank Bhd ('Public Bank') dalam tindakan tersebut. Plaintif-plaintif memohon untuk menguatkuasakan penghakiman ingkar itu melalui satu writ penyitaan dan penjualan pada 15 November 2002. Akibatnya, Public Bank telah mengeluarkan satu cek pemilik bank ('cek tersebut') untuk jumlah penghakiman atas nama penolong kanan pendaftar ('PKP'). Plaintif-plaintif menuntut bahawa semasa plaintif-plaintif menghendaki Public Bank membuat bayaran cek kepada plaintif-plaintif secara langsung, Public Bank terus menghubungi defendan pertama, seorang hakim di Mahkamah Tinggi Kuala Lumpur, yang pada masa matan bercuti di Singapura. Beliau telah memberi arahan melalui panggilan telefon dan mengarahkan PKP untuk membenarkan dan menerima bayaran Public Bank ke mahkamah sebaliknya. Berikutan itu, bayaran cek tersebut dihentikan.

Apabila plaintif-plaintif tidak menerima jumlah penghakiman tersebut, mereka menyalahkan defendan-defendan, khususnya defendan pertama dengan mendakwa bahawa tindakan dan peninggalan defendan pertama telah menyebabkan kehilangan dan kerugian plaintif-plaintif, oleh itu memohon untuk jumlah penghakiman itu, selain daripada ganti rugi tambahan, punitif dan teladan sebanyak RM10j berserta faedah dan kos. Plaintif-plaintif kemudiannya memohon untuk menghalang Peguam Negara atau pegawai-pegawainya daripada bertindak bagi pihak defendan pertama, yang telah ditolak dengan kos. Permohonan defendan-defendan ke mahkamah untuk membatalkan penyataan tuntutan plaintif-plaintif di bawah A 18 k 19(1)(a), (b) atau (d) telah dibenarkan. Plaintif-plaintif kini merayu.

Diputuskan, menolak rayuan-rayuan tersebut:

(1) Pada masa matan defendan pertama merupakan seorang hakim Mahkamah Tinggi Kuala Lumpur dan juga ketua bahagian sivil yang bertanggungjawab untuk semua perkara berkaitan pelaksanaan aset-aset di Kuala Lumpur, termasuklah writ penyitaan dan penjualan. Dalam tajuk tindakan itu, dan perenggan 2(a) dan (b) kepada penyataan tuntutan plaintif-plaintif, plaintif-plaintif telah menyaman defendan pertama sebagai hakim Mahkamah Tinggi. Plaintif-plaintif terikat dengan pliding mereka. Tiada persoalan tentang defendan pertama disaman dalam kapasiti peribadinya (lihat perenggan 18); *Decision Regarding Counsel for Christopher Fernando's Objection to the Attorney General's Application to Represent Dato' Augustine Paul* [2002] 2 AMR 2357 diikut.

(2) Peguam Negara di bawah satu kewajipan mandatori memperuntukkan defendan pertama dengan wakil sah bagi tujuan membela dan melindungi jabatan dan institusi pentadbiran keadilan di Malaysia (lihat perenggan 21); *Tun Dato' Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Haji Omar & Ors* [1988] 3 MLJ 149 dan *Malaysian Bar v Tan Sri Dato Abdul Hamid* [1989] 2 MLJ 281 diikut. Dengan ketiadaan butir-butir untuk mengesahkannya, tidak ada penghalang sah atau berdasarkan kenyataan terhadap Peguam Negara dan pegawainya memperuntukkan wakil sah untuk defendan pertama. Mahkamah bawahan telah dengan sewajarnya memutuskan bahawa Peguam Negara dan pegawai-pegawai undang-undangnya terikat dengan sah untuk mewakili defendan pertama (lihat perenggan 28–29).

(3) Berdasarkan pembentukan sebenar A 46 k 13(2), k 17, k 21 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') ia amat jelas bahawa kesemua wang yang diterima seterusnya hendaklah dibayar ke mahkamah terlebih dahulu dan wang yang dikreditkan hendaklah

dibayar terus kepada plaintif-plaintif, kerana ia akan bertentangan dengan kaedah-kaedah tersebut. Dalam keadaan sedemikian, cek tersebut telah dibuat dengan betul kepada PKP dan diterima oleh syerif. Apabila Public Bank membayar jumlah penghakiman itu melalui cek sebagai penyelesaian untuk penghakiman ingkar, maka penghakiman ingkar itu tidak lagi berkuatkuasa atau mempunyai apa-apa kesan lagi (lihat perenggan 47–48).

(4) Memandangkan penghakiman ingkar dalam rayuan semasa tidak patut berkuatkuasa atau mempunyai apa-apa kesan lagi, asas tindakan plaintif-plaintif gagal, dan plaintif-plaintif tidak lagi mempunyai apa-apa kausa tindakan yang munasabah terhadap defendan-defendan (lihat perenggan 50).

(5) Kekebalan kehakiman yang diberikan oleh s 14(1) Akta Kehakiman Mahkamah 1964 adalah luas untuk merangkumi pelepasan tanggungjawab defendan pertama di bawah perkara 121 dan undang-undang bertulis. Tanggungjawab tersebut termasuklah kesemua tindakan dan tanggungjawab yang diharapkan atau diberikan untuk dilaksanakan oleh defendan pertama, kedua-duanya di dalam dan di luar Malaysia. Arahan-arahan dan perintah-perintah yang dibuat oleh defendan pertama secara keseluruhannya dalam kuasanya dan dalam batasan bidang kuasanya yang dengan sah telah diberikan ke atasnya oleh perkara 121 dan undang-undang bertulis, tidak mengira fakta bahawa beliau sedang bercuti di Singapura dan di luar negara. Cara dan sifat termasuklah tempat dari mana beliau menggunakan kuasa itu (panggilan telefon daripada Singapura semasa bercuti) tidak relevan. Fakta dan keadaan sedia ada di mahkamah bawahan dan sekarang dalam rayuan semasa tanpa ragu menarik permohonan kekebalan kehakiman di bawah s 14(1). Tujuan kausa tindakan plaintif-plaintif sebenarnya adalah suatu yang sia-sia di bawah A 18 k 19(1)(a), di mana tiada kausa tindakan yang munasabah terhadap defendan pertama, dan oleh itu tiada liabiliti vikarius boleh dianggap berpunca daripada defendan kedua (lihat perenggan 68–69).

(6) Tindakan plaintif-plaintif terhadap defendan-defendan difailkan berdasarkan writ penyitaan dan penjualan terhadap Public Bank bagi tujuan pelaksanaan penghakiman ingkar. Tindakan tersebut telah difailkan pada 14 Mei 2005, iaitu dua tahun selepas penghakiman ingkar itu diketepikan. Kemasukan fakta-fakta penting dan tidak dipertikaikan dalam penyataan tuntutan plaintif-plaintif telah menggambarkan persepsi sebenar. Ia digambarkan dengan nyata dan jelas bahawa tujuan kausa tindakan plaintif-plaintif yang timbul daripada writ penyitaan dan penjualan terhadap Public Bank adalah tanpa apa-apa asas langsung. Bolehlah dikatakan ianya bersifat melampau, remeh atau menyusahkan di bawah A 18 k 19(1)(b), yang

mana seperti tidaklah perlu dan tidak relevan, atau bahawa ia dengan jelas tidak boleh dikekalkan (lihat perenggan 77–78).]

Notes

For cases on judicial immunity generally, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3746–3764.

For cases on suit against judge, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3762–3764.

Cases referred to

Ambard v Attorney General [1936] AC 322 (refd)
Anowar Hussain v Ajoy Kumar AIR 1965 SC 1651 (refd)
Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd [1989] 2 MLJ 423 (refd)
Bandar Builder Sdn. Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 236 (refd)
Boey Oi Leng (Trading as Indah Reka Construction and Trading) v Trans Resources Corporation Sdn Bhd [2001] 4 AMR 4807 (refd)
Credit Corp (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409 (refd)
Decision Regarding Counsel for Christopher Fernando's Objection to the Attorney General's Application to Represent Dato' Augustine Paul [2002] 2 AMR 2357 (folld)
Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin [1988] 1 SLR 374 (refd)
Gallo v Dawson (1988) ALR 801 (refd)
Hadi bin Hassan v Suria Records Sdn Bhd [2005] 3 MLJ 522 (refd)
Haji Husin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors [1983] 2 MLJ 227 (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Letang v Cooper [1965] 1 QB 222 (refd)
Lim Kean v Choo Koon [1970] 1 MLJ 158 (refd)
Malaysian Bar v Tan Sri Dato Abdul Hamid [1989] 2 MLJ 281 (folld)
Moll v Butler (1985) 10 Fam LR 544 SCNSW (refd)
Nakhla v Mc Carthy (1978) 1 NZLR 291 (refd)
Nasri v Mesah [1971] 1 MLJ 32 (refd)
Newacres Sdn. Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)
Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn. Bhd (formerly known as Lipkland (Sabah) Sdn. Bhd & Ors [1996] 1 MLJ 309 (refd)
Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi [1997] 2 MLJ 118 (refd)
R v Commissioner of Police of the Metropolis; ex p Blackburn (No 2) [1968)] 2 QB 150 (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)
Saw Gaik Beow v Cheong Yew Weng & Ors [1989] 3 MLJ 301 (refd)

Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385 (refd)
Sirros v Moore & Ors [1975] QB 118 (refd)
Standard Chartered Bank v Yong Chan [1974] 1 MLJ 157 (refd)
Tai Choi Yu v Ian Chin Hon Chong [2002] 5 MLJ 518 (refd)
Taylor v Canada (Attorney General) (2000) 3 FC 298 (refd)
Tee Yam @ Koo Tee Yam v Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2005] 5 MLJ 645 (refd)
Tractors Malaysia v Tio Chee Hing [1975] 2 MLJ 1 (refd)
Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Haji Omar & Ors [1988] 3 MLJ 149 (folld)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (refd)

Legislation referred to

Anti-Corruption Act 1997 s 15
Charter of Rights and Freedoms [Canada]
Constitution Act 1982 [Canada]
Courts of Judicature Act 1964 ss 14(1), 17, 20
Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969
Federal Constitution arts 121, 125(3), 145(2)
Government Proceedings Act 1956
Interpretation Acts 1948 and 1967 s 3
Judges' Code of Ethics 1994 para 3(1)(a),(d)
Judicial Officers Protection Act 1950 [India] s 1
Prevention of Corruption Act 1997 s 15
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d), (2), O 46 rr 1–27, O 47

Darshan Singh Khaira (Darshan Singh & Co) for the appellants.
Dato' Mary Lim Thiam Suan, Narkunavathy Sandareson with her (Senior Federal Counsels, Attorney General's Chambers) for the respondents.)

Low Hop Bing JCA (delivering judgment of the court):

APPEALS

[1] These two appeals lodged by the appellants-plaintiffs ('the plaintiffs') arose from the orders of the Kuala Lumpur High Court made pursuant to two summonses in chambers, the particulars of which are:

Application	Order
Encl (8)	Plaintiffs' application, to prevent the Attorney General or his officers from acting for the first respondent-defendant ('the first defendant'), was dismissed with costs.

Encl (6)	Application of the respondents-defendants ('the defendants'), to strike out the plaintiffs' statement of claim, under O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980, was allowed with costs.

(See *Indah Desa Saujana Corp Sdn. Bhd & Ors v James Foong Cheng Yuen & Anor* [2006] 1 MLJ 464 (HC))

[2] After hearing submissions, we dismissed these appeals. Our grounds now follow.

[3] For convenience, the parties herein are referred to in their respective capacities as plaintiffs and defendants in the High Court.

FACTUAL BACKGROUND

[4] On 25 October 2002, the plaintiffs, also the plaintiffs in another action ie Kuala Lumpur High Court Civil Suit No D2–22–987 of 2000, had obtained default judgment for some RM14m ('the judgment sum') against Public Bank Bhd ('Public Bank') in that action.

[5] The plaintiffs sought to enforce the default judgment by way of a writ of seizure and sale on 15 November 2002.

[6] As a result, Public Bank issued a banker's cheque ('the cheque') for the judgment sum in the name of the senior assistant registrar ('the SAR').

[7] On 18 November 2002, the SAR granted a stay of the default judgment.

[8] On 24 April 2003, the SAR set aside the default judgment. On appeal, the judge in chambers had on 22 March 2005 affirmed the SAR's decision. The plaintiffs filed their action against the defendants on 14 May 2005.

[9] Paragraph 5 of the plaintiffs' statement of claim averred, inter alia, that the plaintiffs required Public Bank to pay the cheque to the plaintiffs directly but Public Bank refused, and that Public Bank had directly contacted the first defendant, a judge of the Kuala Lumpur High Court, who was at the material time on leave in Singapore. He gave instructions by way of a telephone call and directed the SAR to allow and accept Public Bank's payment into court instead.

[10] Subsequently, payment of the cheque was stopped. When the plaintiffs did not receive the judgment sum, they blamed the defendants, particularly the first defendant, alleging that:

(i) the first defendant being attached to the civil division of the Kuala Lumpur High Court was only to deal with the cases assigned thereto;

(ii) there was no direction or change of direction for the first defendant to deal with plaintiffs' case in the commercial division;

(iii) the first defendant was acting as the agent of Public Bank when he gave instructions to the SAR to accept payment into court;

(iv) the first defendant was obviously allowing Public Bank to play for time and delay the encashment of the cheque;

(v) the first defendant must have known that Public Bank was buying time and had never intended to honour the cheque;

(vi) the first defendant's actions and omissions have a tendency to cause loss of confidence and damage the integrity of the banking practice and system in the country;

(vii) the first defendant wrongly interfered with the process of justice and execution and wrongly induced the bailiffs and the SAR to accept the cheque when he had no business, duty, right or responsibility to do so; and

(viii) The first defendant's acts were contrary to the provisions of para 3(1)(a) and (d) of the Judges Code of Ethics 1994, s 15 of the Anti-Corruption Act 1997, s 20 of the Courts of Judicature Act 1964, s 2(1) of the Emergency (Essential Powers) Ordinance 22 of 1970 and the Chief Justice's Directive No KHN 156 dated 10 October 1998.

[11] The plaintiffs claim that the first defendant's wilful, malicious (intentional) malfeasance and misfeasance, mala fide acts and omissions have caused the plaintiffs' loss and damage, thereby seeking the judgment sum, in addition to aggravated, punitive and exemplary damages of RM10,000,000, together with interest thereon at 8% pa with effect from 25 October 2002, and costs.

LEGAL REPRESENTATION

[12] In seeking to prevent the Attorney General or his officers from representing the first defendant, plaintiffs' learned counsel Mr Darshan Singh Khaira submitted that:

(1) the first defendant's acts were not while sitting in the course of a case as a judge;

(2) there was an allegation of corrupt practice etc and it is inappropriate for the Attorney General who is also the public prosecutor to act for the first defendant; and

(3) the Attorney General is embarrassed as he is in a conflict of interest situation especially as he represents public interest.

[13] Support was sought, inter alia, in:

(1) art 145 of the Federal Constitution ('art 145'); and

(2) *Decision Regarding Counsel for Christopher Fernando's Objection to the Attorney General's Application to Represent Dato' Augustine Paul* [2002] 2 AMR 2357 (HC) ('*Dato Augustine Paul* ').

[14] On the other hand, learned Senior Federal Counsel, Dato' Mary Lim Thiam Suan (Ms Narkunavathy Sandareson with her) took the position that the decision of the court below is perfectly sound, as the Attorney General is, under art 145, bound, and in the interest of the administration of justice, to represent a judge who performs functions under the Federal Constitution, deriving support from *Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Haji Omar & Ors* [1988] 3 MLJ 149 (SC) ('*Tun Salleh Abas*').

[15] The court below has sustained the learned senior federal counsel's submission.

[16] At this juncture, we shall refer to art 145(2) which provides, inter alia, that it shall be the duty of the Attorney General to discharge the functions conferred on him by or under the Federal Constitution or any other written law.

[17] Article 145 was considered by the then Supreme Court in *Tun Salleh Abas*. The pertinent facts are that at the hearing of the Attorney General's application by way of notice of motion to set aside an ex parte order made by five Supreme Court judges, restraining a tribunal set up under art 125(3) of the Federal Constitution Federal Constitution to inquire into and make recommendations concerning Tun Salleh Abas. Tun Salleh Abas had obtained the ex parte order. He applied to strike out the Attorney General's notice of motion on the ground, inter alia, that it was not competent for the Attorney General to represent the five members of the tribunal. Hashim Yeop A Sani SCJ (later CJ (Malaya)) delivering judgment of the court, held that the Attorney General is a public officer under the Federal Constitution and art 145 properly read gives ample power to the Attorney General to represent the government and anybody or person performing any function thereunder.

[18] It is uncontroverted that at the material time, the first defendant was a judge of the Kuala Lumpur High Court as well as the head of civil division having charge of all matters pertaining to the execution of assets in Kuala Lumpur, including writs of seizure and sale. In the title to the action, and para 2(a) and (b) of the plaintiffs' statement of claim, the plaintiffs have sued the first defendant as a judge of the High Court. The plaintiffs are bound by their own pleadings: see eg *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Standard Chartered Bank v Yong Chan* [1974] 1 MLJ 157; and *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152. There is no question of the first defendant having been sued in his personal or private capacity.

[19] Having determined the official capacity of the first defendant, we find it necessary to deal with the performance of the first defendant's duties in relation to execution proceedings in the light of the Federal Constitution and any other written law for the purpose of resolving the issue of legal representation under art 145(2).

EXECUTION PROCEEDINGS

[20] In the discharge of his duties as a judge of the High Court in Kuala Lumpur, especially in relation to execution of assets by way of a writ of seizure and sale, O 46 and O 47 of the Rules of the High Court 1980 made under s 17 of the Courts of Judicature Act 1964 ('s 17') would apply. Section 3 of the Interpretation Acts 1948 and 1967 defines 'written law' as, inter alia, 'Acts of Parliament and subsidiary legislation made thereunder'. Subsidiary legislation contained in the Rules of the High Court 1980 in general, made under s 17, and O 46 and O 47 thereof in particular, are part and parcel of written law (collectively 'the written law') and has the force of law governing matters of procedure.

[21] Article 121 of the Federal Constitution provides for two High Courts of co-ordinate jurisdiction and status viz one in the States of Malaya and one in the States of Sabah and Sarawak. The exercise of duties by the first defendant as a judge of the High Court of Malaya at Kuala Lumpur under art 121 and the written law is not only performance of the functions of a judge under the Federal Constitution generally, but also under the written law specifically. In line with the judgment of the then Supreme Court in *Tun Salleh Abas*, the Attorney General is under a mandatory duty to provide the first defendant with legal representation, in order to defend and protect the office and institution of the administration of justice in Malaysia.

[22] A similar sentiment was expressed in *Dato Augustine Paul*. There, defence counsel Mr Christopher Fernando applied to commit Augustine Paul J (now FCJ) for contempt for words uttered by the judge in

the course of a criminal trial. There was an objection to the Attorney General's application to represent the judge. Hashim Yusoff J (now FCJ) held that the words were uttered in the course of proceedings in the criminal trial. It was in the course of his work in relation to the office which is established under the Federal Constitution. The Attorney General being an officer established under the Federal Constitution and the Government Proceedings Act 1956 must properly step in and defend the judge not as a private individual but in the protection of such office, the institution of the judiciary and in the interest of the administration of justice in Malaysia.

[23] The issue of legal representation was less problematic in *Malaysian Bar v Tan Sri Dato Abdul Hamid* [1989] 2 MLJ 281 (SC). There, the Malaysian Bar sought leave to apply for committal order against Tan Sri Dato (now Tun) Abdul Hamid bin Omar for alleged contempt of court on the alleged ground of attempting to prevent, frustrate and interfere with the sitting of the then Supreme Court, when holding the office of the Acting Lord President thereof. At the hearing of that application, in the absence of any objection, the Attorney General and his officer had no difficulty in providing legal representation to the Acting Lord President.

ALLEGATION OF CORRUPTION

[24] Paragraph 12 of the plaintiff's statement of claim avers, inter alia, that the first defendant's acts were in breach of:

(a) the Judges' Code of Ethics 1994;

(b) s 15 of the Anti-Corruption Act 1997; and

(c) s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970.

[25] In filing and serving the writ containing the above averments in para 12 of the statement of claim, plaintiffs' counsel may have been actuated by a strong desire to act in the best interest of his clients. However, it is a source of extreme regret that the plaintiffs have resorted to these averments against the first defendant. These averments consist of bare accusations and allegations which do not condescend upon particulars. There was no averment whatsoever that the first defendant had received any gratification, consideration, monetary or other favours, or had any personal interest or benefit in the matter complained of. Nothing turned on the plaintiffs' allegations of corruption or corrupt practice against the first defendant in any specific particular. At most, these are unfounded and unwarranted criticisms and vilifications. No reasonable man can be expected to act on figments of imagination.

[26] The draftsman of the plaintiffs' statement of claim and the person who has approved of the above averments had crafted and drafted them in very strong language, bringing about criticisms and vilifications against the first defendant. In this regard, it is certainly not out of place to remind the people concerned of the words of wisdom spoken by Lord Atkin in *Ambard v Attorney General* [1936] AC 322 viz:

> The path of criticism is a public way: the wrong headed are permitted to err therein: provided that the members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even thought outspoken, comments of ordinary men.

[27] Strong support for Lord Atkin was shown in *R v Commissioner of Police of the Metropolis; ex p Blackburn (No 2)* [1968)] 2 QB 150 by Lord Denning MR in the following words:

> All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

[28] Reverting to the plaintiffs' averments in para 12 of the statement of claim, in the absence of particulars to substantiate them, we can find no legal or factual impediment to the Attorney General and his officer providing legal representation to the first defendant.

[29] We therefore hold that, in relation to encl (8), the court below has correctly held that the Attorney General and his legal officers are legally bound to represent the first defendant.

STRIKING OUT UNDER O 18 r 19

[30] In urging the court to strike out the plaintiffs' statement of claim, under O 18 r 19(1)(a), (b) or (d), the defendants argued that:

(i) as of 18 November 2002, Public Bank has obtained an interim stay of the writ of seizure and sale pending the disposal of Public Bank's application to set aside the default judgment;

(ii) Public Bank had on 24 April 2003 successfully obtained an order from the registrar setting aside the judgment, and on 22 March 2005, the registrar's decision was affirmed on appeal by the judge in chambers;

(iii) payment of the judgment sum to the court in the name of the SAR accords with O 46; and

(iv) the first defendant who was sued in the capacity of a judge of the High Court is protected by s 14(1) of the Courts of Judicature Act 1964 ('s 14(1)').

[31] The plaintiffs are of the view that:

1 their action is not obviously unsustainable, in the context of *Bandar Builder Sdn. Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 236 (SC); and *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn. Bhd (formerly known as Lipkland (Sabah) Sdn. Bhd & Ors* [1996] 1 MLJ 309 (CA); and

2 the first defendant was not acting in a judicial capacity and is therefore not protected by s 14(1), citing, inter alia, *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi* [1997] 2 MLJ 118 (CA).

[32] The court below held that the plaintiffs' action against the defendants was 'bound to fail', being wholly bereft of any cause of action and is clearly scandalous, frivolous and vexatious and an abuse of the court process.

[33] The relevant portion of O 18 r.19(1)(a), (b) or (d) merits reproduction as follows:

> 19(1) The Court may at any stage of the proceedings order to be struck out …….. any pleading …….of any writ in the action ……. on the ground that —
>
> (a) it discloses no reasonable cause of action ……; or
>
> (b) It is scandalous, frivolous or vexatious; or
>
> (c) ……;
>
> (d) it is otherwise an abuse of the process of the Court;

[34] When the defendants rely on O 18 r 19(1)(a), no evidence shall be admissible: O 18 r 19(2). This means that the defendants must refer only to the plaintiffs' statement of claim for the purpose of urging the court to strike it out.

[35] In relation to the defendants' reliance on O 18 r 19(1)(b) or (d), affidavit may be resorted to and analysed.

[36] Order 18 r 19(1)(a), (b) or (d) empowers the Court at any stage of the proceedings to strike out the pleadings eg the plaintiffs' statement of claim herein on the ground that it discloses no reasonable cause of action; or it is scandalous, frivolous or vexatious; or is otherwise an abuse of the process of the court, respectively.

[37] There is a plethora of weighty authorities setting out trite principles governing an application under O 18 r 19(1). It has been consistently stated by our courts that any pleading may be struck out if it is obviously unsustainable. Such discretionary power may only be exercised in plain and obvious cases: see eg *Tractors Malaysia v Tio Chee Hing* [1975] 2 MLJ 1; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 236; *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn. Bhd (formerly known as Lipkland (Sabah) Sdn. Bhd & Ors* [1996] 1 MLJ. 309; *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385; and *Haji Husin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors* [1983] 2 MLJ 227.

[38] With the aforesaid principles in mind, we proceeded to consider the specific provisions relied on by the defendants.

NO REASONABLE CAUSE OF ACTION

[39] A reasonable cause of action means simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person: per Diplock LJ in *Letang v Cooper* [1965] 1 QB 222 at p 242. This definition was followed in *Lim Kean v Choo Koon* [1970] 1 MLJ 158; *Nasri v Mesah* [1971] 1 MLJ 32; *Saw Gaik Beow v Cheong Yew Weng & Ors* [1989] 3 MLJ 301; *Newacres Sdn. Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474; and *Credit Corp (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409.

[40] The defendants bear the burden of establishing that the plaintiffs have no reasonable cause of action against them.

[41] The answer to the question of whether the defendants have succeeded in establishing this ground is to be found by reference to the plaintiffs' entire statement of claim which merits reproduction as follows:

(1) The plaintiffs were at all material times judgment creditors vide a default judgment dated 25 October 2002 in favour of the plaintiffs against Public Bank Berhad (6463-H) as defendant in the Kuala Lumpur High Court Civil Suit No D2–22–987–2002.

(2) (a) The first defendant was at all material times a judge of the High Court attached to the Civil Division at Wisma Denmark, Jalan Ampang, Kuala Lumpur.

(b) The second defendant is the employer principal of the first defendant and all other administrators, legal and judicial staff including the senior assistant registrars and the bailiffs.

(3) Pursuant to the said judgment dated 25 October 2002, the plaintiffs issued a writ of seizure and sale vide writ of execution No AE–37–59–2002 dated 13 November 2002 against the properties of the said Public Bank Berhad.

(4) The said defendant, Public Bank Berhad thereupon issued their own Bankers Cheque No 147363 dated 15 November 2002 for RM14,362.312 in favour of Penolong Kanan Pendaftar, Mahkamah Tinggi, Kuala Lumpur in purported accord and settlement and satisfaction of the said writ of execution.

(5) The plaintiffs requested and required the said Public Bank Berhad to pay the cheque directly to the plaintiffs but the said Public Bank Berhad refused to do so and directly contacted the first defendant who directed the senior assistant registrar to allow and accept payment by the Public Bank Berhad instead into court.

(6) The said Penolong Kanan Pendaftar then informed the two bailiffs of the High Court, Kuala Lumpur, namely:

(a) Zainudin bin Ismail, and

(b) Mohd Yusuf bin Jamaludin to stop the said execution although the plaintiffs did not agree to do so and the judgment sum together with interests, costs and bailiffs' expenses and commissions were not tendered in full.

(7) At the said material time, there was no stay of execution.

(8) Thereafter the said Public Bank Berhad stopped payment and the said bankers cheque drawn on themselves was returned by the accountant general as 'tidak laku'.

(9) The plaintiffs aver that a bankers cheque cannot be revoked or stayed or withdrawn and in law is as good as gold and the Plaintiffs had the faith, trust and confidence that it would be honoured.

(10) The said Public Bank Berhad also failed to tender or pay the court bailiffs commission of RM287,246.24 for execution expenses, interests and costs despite repeated reminders to do so from the Penolong Kanan Pendaftar.

(11)(a) The first defendant who is attached to the Civil Division (but the plaintiffs' said case was in the Commercial Division) thereupon as

agent, employee and/or at the request of the officers, solicitors or employees of Public Bank Berhad telephoned the Penolong Kanan Pendaftar, High Court, Kuala Lumpur, namely, Encik Mohammad Nordin bin Abd Rauf, in charge of the matter to accept the said bankers cheque as payment into court.

(b) The first defendant was obviously allowing the said Public Bank Berhad to play for time and delay the encashment of the bankers cheque.

(c) The plaintiffs have suffered a detriment to their disadvantage as they have a legitimate expectation that in law and on the facts that the banker's cheque would be cleared and the defendants are now stopped from asserting or denying otherwise.

(d) The first defendant must have known that Public Bank Berhad was buying time and had never intended to honour the cheque which in law and in fact could not be stopped or revoked.

(e) The plaintiffs had a legitimate expectation that the banker's cheque will be honoured.

(f) The plaintiffs aver that the actions and omissions of the first defendant have a tendency to cause loss of confidence and damage the integrity of the banking practices and system in the country.

(12)(a) The plaintiffs aver that the first defendant had wrongly interfered with the process of justice and execution and wrongly induced the employees, officers and agents of the second defendant to accept the said cheque when he had no business, duty, right or responsibility to do so.

(b) The said acts were in breach and contrary to the Judges' Code of Ethics 1994 in particular para 3(1)(a) and (d).

(c) The said acts were also in breach and contrary to s 15 of the Prevention of Corruption Act 1997 (sic) (Act 575–97).

(d) The said acts were also contrary to s 20 of the Courts of Judicature Act 1964 whereby the first defendant was assigned to the Civil Division of the High Court and to deal with cases only assigned thereto and there was no direction or change of direction for him to deal with cases in the Commercial Division.

(e) The said acts also come within the definition of corrupt practice within s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970.

(f) The said acts were also in breach and contrary to the Chief Justice of Malaysia Directive No KHN 156 dated 10 October 1998.

(13) The plaintiffs aver that the first defendant made the telephone call to the said senior assistant registrar from Singapore although he was on leave.

(14) Thereafter by a letter dated 16 March 2004, the first plaintiff complained to the Chief Justice who replied by letter dated 14 May 2004 that he was investigating the matter but there has been no reply to date.

(15) The plaintiffs aver that the defendants by their wilful, malicious (intentional) malfeasance and misfeasance, mala fide acts and omissions have caused loss and damage to the plaintiffs and even inflicted unlawful losses on the second defendant itself.

Particulars of Loss

(a) Judgment sum RM10,000,000

(b) Damages RM 750,000

(c) Costs RM 225

(d) Interest at 8% effect from 25 October 2002 till realization RM15,511,296

(e) Bailiffs' commission RM 287,246.24

(16) The plaintiffs claim aggravated, punitive and exemplary damages in the minimum sum of RM10m.

(17) The plaintiffs aver that unless the defendants are mulcted in damages, costs and ordered to make good the loss, the public will lose faith and confidence in the administration of justice and in the legal system and rule of law.

(18) Whereof the plaintiffs claim judgment for:

(a) RM14,362;

(b) aggravated, punitive and exemplary damages in the sum of RM10m;

(c) interests thereon at 8% per annum with effect from 25 October 2002;

(d) costs; and

(e) further or other order.

Dated this 14th day of May 2005

[42] As the plaintiffs' statement of claim hinges heavily on the process of execution, in particular, the writ of seizure and sale, a detailed examination is warranted.

WRIT OF SEIZURE AND SALE

[43] Plaintiffs' purported cause of action was based on a writ of seizure and

sale as a process of execution to satisfy the judgment sum. Plaintiffs maintained that the cheque should be paid direct to them instead of payment in the name of the SAR.

[44] The court below held that O 46 clearly postulates that all payments on judgment sums must always be paid into court through the SAR and this includes all monies collected by the sheriff pursuant to a writ of seizure and sale as the sheriff must be in the irrefutable position to collect his commission; and only the sheriff is empowered to call off the writ of execution or writ of seizure and sale process.

[45] This issue, of whether the proceeds of execution by way of a writ of seizure and sale should be paid to the court or to the plaintiffs as execution creditors direct, is regulated by the provisions contained in O 46 r 1 to r 13 generally; O 46 r 14 to 21 governing the duties of the sheriff; and O 46 r 22 to r 27 which provides for sale by the sheriff.

[46] More specifically, O 46 rr 13(2), 17 and 21 read:

> Order 46 r 13(2):
>
> Where the movable property seized under a writ of execution or distress is sold by the sheriff *or he receives the amount of the levy without sale*, any sums of money deposited by the execution creditor must, so far as the monies coming to the hands of the sheriff will allow, be refunded to the execution creditor.
>
> Order 46 r 17:
>
> *The proper officer receiving any money under any writ of execution* or distress must give for every sum so received a receipt.
>
> Order 46 r 21:
>
> Subject to these rules … *any sum of money paid* by the sheriff to the credit of the execution creditor or by the *judgment debtor, under rule 17* shall, subject to any order of court, be paid to the execution creditor or judgment debtor respectively on his application without an order.
>
> (Emphasis added.)

[47] Upon a true construction of the aforesaid rules, with the above emphasis, it is abundantly clear to us that all monies received pursuant thereto have to be paid into court first and the money so credited shall be paid to the plaintiffs as judgment creditors pursuant to these rules. We are unable to uphold the plaintiffs' submission that the cheque should be paid

direct to the plaintiffs, as that would run counter to the rules. In the circumstances, the cheque was rightly made out in favour of the SAR and accepted by the sheriff.

[48] When Public Bank paid the judgment sum by way of the cheque in satisfaction of the default judgment, the default judgment ceased to have any force or effect.

[49] The High Court of Singapore expressed this sentiment in the following passage:

> But common sense, wholly apart from authority, tells one that, when the total amount has been paid which is ordered by a judgment to be paid, the judgment ought no longer to be of any force or effect: per Choor Singh J in *United Investment & Finance Ltd v Universal Service Agency* [1965] 2 MLJ 235 at p 237 quoting *Clissold v Cratchley & Ors* (1910) 2 KB 244 at p 249.

[50] Since the default judgment in the instant appeal ought no longer to be of any force or effect, the substratum of the plaintiffs' action collapses, and the plaintiffs no longer have any reasonable cause of action against the defendants.

JUDICIAL IMMUNITY

[51] The doctrine of judicial immunity encompasses immunity at common law and under statute. Common law jurisdictions have shown extensive recognition for this doctrine. By way of illustration, the courts in England, Australia and New Zealand apply the common law doctrine of judicial immunity, while Malaysia, India and Canada express the doctrine of judicial immunity in statutory provisions.

JUDICIAL IMMUNITY AT COMMON LAW

[52] In England, the Court of Appeal in the celebrated case of *Sirros v Moore & Ors* [1975] QB 118 dismissed an appeal by a plaintiff in an action against a judge, arising from words spoken by the judge, the orders he gave and the sentences he imposed. The following principles may be culled therefrom:

(i) No action is maintainable against a Judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him;

(ii) No matter that the Judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitables, he is not liable to an action;

(iii) The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling;

(iv) If the judge has accepted bribes or has been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts;

(v) The reason for judicial immunity is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear;

(vi) This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be;

(vii) Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself, 'If I do this, shall I be liable in damages?';

(viii) If the act was, or purported to be, a judicial act and was within the judicial powers of the Judge, he is immune from civil liability. Public policy requires that the Judge's conduct should not be impugned; and

(ix) Where a Judge, though acting within his powers, is shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all, the remedy of his removal from office would be available, but in the public interest, his conduct should not be open to debate in a private action.

[53] In Australia, the courts have shown a similar rationale and test for judicial immunity. In *Gallo v Dawson* (1988) ALR 801, the High Court struck out a suit brought against a judge as he is not liable to be sued in respect of acts done in the performance of his judicial duties.

[54] In *Moll v Butler* (1985) 10 Fam LR 544 SCNSW, the Supreme Court of New South Wales was faced with an application to summarily terminate (similar to our O 18 r 19(1)) the action brought against a judge of the Family Court of Australia for committing the plaintiff to prison for contempt.

The court struck out the action after finding that the judge had jurisdiction to make the orders in question and was immune from action, applying the principles enunciated in *Sirros*.

[55] In *Nakhla v Mc Carthy* (1978) 1 NZLR 291 the New Zealand Court of Appeal held that absolute immunity is accorded to a Judge from civil proceedings for acts done in the exercise of his judicial office. Such immunity is not as a private right but to ensure that in the public interest the administration of justice will be carried on without fear of the consequences, without hope or favour.

[56] In *Harvey v Derrick* (1995) 1 NZLR 314, the New Zealand Court of Appeal through Richardson J reaffirmed the rationale for judicial immunity in the following passage:

> A range of public interest considerations has been advanced by court and commentators to justify judicial immunity. The primary grounds are that the public interest requires an independent judiciary free from the fear of vexatious personal actions, and judicial immunity is necessary to protect the free and independent exercise of judgment in the public interest; that it is crucial in a democracy that Judges be perceived as fair and responsible and judicial immunity is necessary to preserve the dignity and respect of the judicial system as a whole; and that without a rule of judicial immunity it may become increasingly difficult to attract men and women of the highest character and ability to judicial office.

STATUTORY JUDICIAL IMMUNITY

[57] In Canada, judges' judicial immunity is recognized and fully protected by the Constitution Act 1982 and the Canadian Charter of Rights and Freedoms.

[58] In *Taylor v Canada (Attorney General)* (2000) 3 FC 298, the Federal Court of Canada held, inter alia, that:

(i) The most important attributes, that Judges owe to the public objectivity, independence and impartiality, must be protected; and any innovative legal principle that encroaches on these attributes must be carefully scrutinized; and

(ii) It is essential in all courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely; without favour and without fear. This provision of law is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences.

[59] In India s 1 of the Judicial Officers Protection Act 1950, where relevant, reads:

> No judge, …. or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of.

[60] Section 1 was considered in *Anowar Hussain v Ajoy Kumar* AIR 1965 SC 1651. The Supreme Court of India held as follows:

> If the act done or ordered to be done in the discharge of judicial duties is within his jurisdiction, the protection is absolute and no enquiry will be entertained whether the act done or ordered was erroneously, irregularly or even illegally, or was done or ordered without believing in good faith, that he had jurisdiction to do or order the act complained of. If the act done or ordered is not within the limits of his jurisdiction, the Judicial Officer acting in the discharge of his judicial duties is still protected, if at the time of doing or ordering the act complained of, he in good faith believed himself to have jurisdiction to do or order the act. The expression jurisdiction does not mean the power to do or order the act impugned, but generally the authority of the Judicial Officer to act in the matter.

[61] Within our shores, judicial immunity is enacted in s 14(1) which reads:

> No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do so or order the act complained of.

[62] In our view, the applicability of the doctrine of judicial immunity under s 14(1) must be considered in the light of the facts and circumstances prevailing in each particular case, especially conduct which comes within the ambit of the expression 'acting judicially'.

[63] Section 14(1) was considered in *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi* [1997] 2 MLJ 118 (CA). The relevant facts reveal that the registrar of the Johor Bahru High Court had issued a circular to licensed auctioneers. The circular provided for a fixed sum payable in cases of abortive auctions. At pp 129I–130B, Abdul Malek Ahmad JCA (later PCA) delivering judgment of the court held that the registrar was not acting judicially in issuing the circular, in which case s 14(1) provides no protection and so the proceedings against the office of the registrar were held to be in good order.

[64] On the other hand, in *Tai Choi Yu v Ian Chin Hon Chong* [2002] 5 MLJ 518 (HC), the defendant, Judge of the High Court of Sabah and Sarawak, was sued by the plaintiff in respect of an alleged libel contained in the defendant's written judgment delivered in a civil suit in Miri High Court in the discharge of his judicial function as the trial judge. At pp 526–527, Sulaiman Daud JC (now JCA) invoked s 14(1) and held that in view of the immunity conferred on a judge thereunder, the plaintiff's action against the defendant is clearly unsustainable and is doomed to fail right from the outset.

[65] In *Tee Yam @ Koo Tee Yam v Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2005] 5 MLJ 645 (HC), Jeffrey Tan J had the occasion to consider an equipollent provision contained in s 10 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('s 10') which provides, inter alia, that every member of the Advisory Board shall have, in any action or suit brought against him for any act done or omitted to be done in the execution of his duty under the said Ordinance, the like protection and privileges as are by law given to a judge in the execution of his office. Upon a true construction of s 14(1) and s 10, the learned judge concluded that immunity is conferred on every member of the Advisory Board in the circumstances stated therein.

[66] It has been alluded to above that the title to the plaintiff's action and para 2 of the statement of claim against the first defendant show that the first defendant was sued in his capacity as a judge of High Court Malaya.

[67] From the facts in the instant appeal, it was clear that the first defendant was at the material time the judge heading the civil division of the Kuala Lumpur High Court in charge of, inter alia, all matters pertaining to execution and attachment process including writs of seizure and sale in the Kuala Lumpur area.

[68] In our judgment, judicial immunity conferred by s 14(1) is wide enough to extend to the discharge of his duties under art 121 and the written law. These duties include all acts and duties expected or assigned to be performed by the first defendant, both within and outside Malaysia. The instructions and orders made by the first defendant are entirely within his authority and within the limits of his jurisdiction legally conferred upon him by art 121 and the written law, regardless of the fact that he was on leave in Singapore and outside the country. The mode and the manner including the place from which he exercised that authority (phone call from Singapore while on leave) are irrelevant.

[69] The facts and circumstances available in the court below and now in the instant appeal undoubtedly attract the application of judicial immunity

under s.14(1). The plaintiffs' purported cause of action is really an exercise in futility under O 18 r.19(1)(a), there being no reasonable cause of action against the first defendant, and so no vicarious liability can be attributed to the second defendant.

[70] Hence, the defendants have successfully established that the plaintiffs' statement of claim is devoid of any reasonable cause of action.

[71] Although at this juncture, the plaintiffs' statement of claim is capable of being struck out under O 18 r.19(1)(a), nevertheless, in order not to leave any stone unturned, we have also proceeded to consider the other provisions viz O 18 r 19(1)(b) or (d) relied on by the plaintiffs.

SCANDALOUS, FRIVOLOUS OR VEXATIOUS

[72] In the context of O 18 r 19(1)(b), 'scandalous' is taken to mean wholly unnecessary and irrelevant and not just unpleasant allegations: see eg *Boey Oi Leng (Trading as Indah Reka Construction and Trading) v Trans Resources Corporation Sdn Bhd* [2001] 4 AMR 4807 (HC).

[73] 'Frivolous' or 'vexatious' means that the pleadings are obviously unsustainable.

[74] In considering this ground, affidavit and undisputed facts may be referred to.

[75] It is singularly significant to note that the plaintiffs have failed to plead in their statement of claim the undisputed facts that:

(i) Public Bank had on 18 November 2002 obtained from the court below an interim stay on the execution of the writ of seizure and sale until the disposal of the application by Public Bank to set aside the default judgment; and

(ii) Public Bank had on 24 April 2003 successfully obtained an order from the SAR setting aside the default judgment and on appeal, the registrar's order was affirmed by the Judge in chambers on 22 March 2005.

[76] As early as 24 April 2003, there was no longer any judgment to entitle the plaintiffs to file the writ of seizure and sale against Public Bank.

[77] Notwithstanding the above, the plaintiffs' action against the defendants herein was filed on the basis of the writ of seizure and sale against Public Bank purportedly in execution of the default judgment. The action was filed on 14 May 2005, which was some two years after the default judgment had been set aside.

[78] The inclusion of these material and undisputed facts in the plaintiffs' statement of claim would have put the entire picture in proper perspective. That in turn would have plainly and obviously demonstrated that the plaintiffs' purported cause of action arising from the writ of seizure and sale against Public Bank was without any foundation whatsoever. To say the least, it is scandalous, frivolous or vexatious under O 18 r 19(1)(b), in the sense of being wholly unnecessary and irrelevant; or that it is obviously unsustainable.

[79] We therefore hold that the defendants have successfully established that the plaintiffs' action is within O 18 r 19(1)(b).

ABUSE OF THE PROCESS

[80] The court has an inherent jurisdiction to prevent an abuse of its process: *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 (SC).

[81] Illustrations of an abuse of the process of the court include:

(a) an intention to embarass the defendants: *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423; or

(b) where the process of the court has not been used in a bona fide manner and has been abused: *Hadi bin Hassan v Suria Records Sdn Bhd* [2005] 3 MLJ 522.

[82] The categories of abuse of process of the court are never closed and will certainly proliferate pursuant to the myriad of circumstances available from the factual matrix found in each particular case.

[83] In *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1988] 1 SLR 374 at p 384, the Singapore Court of Appeal explained the scope of 'an abuse of the process of the court' under O 18 r.19(1)(d) which is in pari materia with ours. The term has been given a wide interpretation by the courts and includes considerations of public policy and the interests of justice. It signifies that the process of the court must be used bona fide and properly and must not be abused. On the facts before us, the defendants have established an abuse of the process of the court.

A CONCLUSION

[84] The result is that the plaintiffs' appeals are wholly without merits. They are dismissed with costs. The orders of the court below are affirmed. Deposit to the defendants towards account of taxed costs.

B

[85] Having heard and dismissed this appeal with costs on 18 July 2007, my learned brother Mokhtar Sidin JCA has since retired. My learned brother Mohd Ghazali JCA has read this judgment in draft and has expressed his agreement with it.

C

Appeals dismissed with costs.

Reported by Loo Lai Mee

D

E

F

G

H

I